

crime shall not be at issue in a proceeding under this subpart.

§ 308.158 Filing papers and effective date.

(a) *Filing with the regional office.* Applications pursuant to section 19 shall be filed in the appropriate regional office.

(b) *Effective date.* An application pursuant to section 19 may be made in writing at any time more than one year after the issuance of a decision denying an application pursuant to section 19. The removal and/or prohibition pursuant to section 19 shall continue until the applicant has been reinstated by the Board of Directors or its designee for good cause shown.

§ 308.159 Denial of applications.

A denial of an application pursuant to section 19 shall:

(a) Inform the applicant that a written request for a hearing, stating the relief desired and the grounds therefor and any supporting evidence, may be filed with the Executive Secretary within 60 days after the denial; and

(b) Summarize or cite the relevant considerations specified in § 308.157 of this subpart.

§ 308.160 Hearings.

(a) *Hearing dates.* The Executive Secretary shall order a hearing to be commenced within 60 days after receipt of a request for hearing on an application filed pursuant to § 308.159. Upon the request of the applicant or FDIC enforcement counsel, the presiding officer or the Executive Secretary may order a later hearing date.

(b) *Burden of proof.* The ultimate burden of proof shall be upon the person proposing to become or continue as an institution-affiliated party with respect to an insured depository institution; to own or control directly or indirectly an insured depository institution; or to participate directly or indirectly in any manner in the conduct of the affairs of an insured depository institution. The burden of going forward with a *prima facie* case shall be upon the FDIC.

(c) *Hearing procedure.* (1) The hearing shall be held in Washington, DC, or at another designated place, before a pre-

siding officer designated by the Executive Secretary.

(2) The provisions of §§ 308.06 through 308.12, 308.16, and 308.21 of the Uniform Rules and §§ 308.101 through 308.102 and 308.104 through 308.106 of subpart B of the Local Rules shall apply to hearings held pursuant to this subpart.

(3) The applicant may appear at the hearing and shall have the right to introduce relevant and material documents and oral argument. Members of the FDIC enforcement staff may attend the hearing and participate as a party.

(4) There shall be no discovery in proceedings under this subpart.

(5) At the discretion of the presiding officer, witnesses may be presented within specified time limits, provided that a list of witnesses is furnished to the presiding officer and to all other parties prior to the hearing. Witnesses shall be sworn, unless otherwise directed by the presiding officer. The presiding officer may ask questions of any witness. Each party shall have the opportunity to cross-examine any witness presented by an opposing party. The transcript of the proceedings shall be furnished, upon request and payment of the cost thereof, to the applicant afforded the hearing.

(6) In the course of or in connection with any hearing under this subsection, the presiding officer shall have the power to administer oaths and affirmations, to take or cause to be taken depositions of unavailable witnesses, and to issue, revoke, quash, or modify subpoenas and subpoenas duces tecum. Where the presentation of witnesses is permitted, the presiding officer may require the attendance of witnesses from any state, territory, or other place subject to the jurisdiction of the United States at any location where the proceeding is being conducted. Witness fees shall be paid in accordance with § 308.14 of the Uniform Rules.

(7) Upon the request of the applicant afforded the hearing, or FDIC enforcement staff, the record shall remain open for five business days following the hearing for the parties to make additional submissions to the record.

(8) The presiding officer shall make recommendations to the Board of Directors, where possible, within 20 days

after the last day for the parties to submit additions to the record.

(9) The presiding officer shall forward his or her recommendation to the Executive Secretary who shall promptly certify the entire record, including the recommendation to the Board of Directors or its designee. The Executive Secretary's certification shall close the record.

(d) *Written submissions in lieu of hearing.* The applicant or the bank may in writing waive a hearing and elect to have the matter determined on the basis of written submissions.

(e) *Failure to request or appear at hearing.* Failure to request a hearing shall constitute a waiver of the opportunity for a hearing. Failure to appear at a hearing in person or through an authorized representative shall constitute a waiver of hearing. If a hearing is waived, the person shall remain barred under section 19.

(f) *Decision by Board of Directors or its designee.* Within 60 days following the Executive Secretary's certification of the record to the Board of Directors or its designee, the Board of Directors or its designee shall notify the affected person whether the person shall remain barred under section 19. The notification shall state the basis for any decision of the Board of Directors or its designee that is adverse to the applicant.

Subpart N—Rules and Procedures Applicable to Proceedings Relating to Suspension, Removal, and Prohibition Where a Felony Is Charged

§ 308.161 Scope.

The rules and procedures set forth in this subpart shall apply to the following proceedings:

(a) To suspend an institution-affiliated party of an insured state nonmember bank, or to prohibit such party from further participation in the conduct of the affairs of the bank, where the individual is charged in any state, Federal, or territorial information or indictment, or complaint, with the commission of, or participation in, a crime involving dishonesty or breach of trust punishable by imprisonment ex-

ceeding one year under state or Federal law; or

(b) To remove from office or to prohibit an institution-affiliated party from further participation in the conduct of the affairs of the bank, except with the consent of the Board of Directors or its designee, if continued service or participation by such party poses a threat to the interests of the bank's depositors or threatens to impair public confidence in the depository institution, where a judgment of conviction or an agreement to enter a pre-trial diversion or other similar program is entered against such party, not subject to further appellate review, has been entered against the individual for the commission of, or participation in, a crime involving dishonesty or breach of trust punishable by imprisonment exceeding one year under state or Federal law.

§ 308.162 Relevant considerations.

(a)(1) In proceedings under § 308.161 (a) and (b) for a suspension, removal or prohibition order, the following shall be considered:

(i) Whether the alleged offense is a crime which is punishable by imprisonment for a term exceeding one year under state or Federal law, and which involves dishonesty or breach of trust; and

(ii) Whether continued service or participation by the institution-affiliated party may pose a threat to the interest of the bank's depositors, or threatens to impair public confidence in the bank.

(2) Additional factors in the specific case that appear relevant to its decision to continue in effect, rescind, terminate, or modify a suspension, removal or prohibition order may be considered.

(b) The question of whether an institution-affiliated party charged with a crime is guilty of the crime charged shall not be tried or considered in a proceeding under this subpart.

§ 308.163 Notice of suspension, and orders of removal or prohibition.

(a) *Notice of suspension or prohibition.*
(1) The Board of Directors or its designee may suspend or prohibit from further participation in the conduct of